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Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a public official being sued under 42 U.S.C. §1983 entitled to indefinitely delay trial on the merits by filing multiple appeals on the same issue of qualified immunity, notwithstanding the fact that the Court of Appeals has decided definitively in the first appeal, that the official was not entitled to immunity as a matter of law, particularly when the successive appeals raise the same arguments that were raised in the first appeal, and when the issue turns on numerous factual questions germane solely to this case, and which require a trial on the merits?

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NO. 92-1823

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

OLLIE BELLE ROSS, Individually, and JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

This case has been brought to recover for wrongful death under 42 U.S.C. §1983 by the mother and other family members of William Ross, a 12 year-old boy who drowned off a breakwater in Waukegan, Illinois in August of 1985. The case, although filed in 1986, has

[1] These facts are gleaned from Plaintiffs' Counter-Statement of Uncontested Facts and supporting materials filed in opposition to Johnson's Motion for Summary Judgment, pursuant to Local Rule 12 of the United States District Court of the Northern District of Illinois.

not been tried. It comes before this Court in the wake of the Seventh Circuit Court of Appeal's second successive dismissal of Petitioner, Gordon Johnson's claims of qualified immunity.

The undisputed facts of this case remain as they were summarized in the opinion of the Seventh Circuit Court of Appeals when the case first came before it in 1990:

> *On August 11, 1985, the city of Waukegan, Illinois, held the Waukegan Lakefront Festival on the shores of Lake Michigan. Twelve-year old William Ross attended the event but abandoned the day's organized activities for a stroll with a friend on a breakwater that extended out into the lake. At the tip of the breakwater, William fell into the water and sank. Immediately, William's friend ran for help.*
>
> *The plea of William's friend was answered promptly by on-duty Waukegan emergency personnel located at the nearby festival. Within ten minutes of William's entry into the water, two lifeguards, two fire-fighters, and one police officer were on the scene with equipment to effect a rescue. In addition, two nearby scuba-diving civilians offered the assistance of themselves, their boat, and their equipment.*
>
> *Before any rescue attempt could begin, however, Lake County Deputy Sheriff Gordon Johnson arrived in a marine patrol boat. The city of Waukegan and Lake County had previously entered into an intergovernmental agreement that required the county to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Under its authority to police, the lake, the county and its sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the city of Waukegan Fire Department could carry out such a rescue.*
>
> *With this policy in mind, Deputy Johnson ordered all of the persons then on the scene to cease their rescue efforts. When the civilian scuba divers stated that they would attempt the rescue at their own risk, Johnson responded that he would arrest them upon their entry into the water and even positioned his boat so as to prevent their dive. A Waukegan policy officer agreed that*

> *Johnson had authority over the scene and advised his fellow city employees that they should heed Johnson's instructions.*
>
> *A full twenty minutes after the initial rescuers arrived at the scene and approximately thirty minutes after the boy had fallen into the water, the officially authorized divers finally retrieved William's body. Although William showed clinical signs of life after being pulled from the water, he was declared dead the following morning.*

Ross v. United States, et. al. 910 F.2d 1422, 1424-25 (7th Cir. 1990).

II. PROCEDURAL HISTORY

After Plaintiffs filed their action against Gordon Johnson, the County of Lake and others in Federal district court, Johnson moved to dismiss the Complaint, citing precisely the issue of qualified immunity that is involved here: namely, whether he knew or should have known that his actions on August 11, 1985 would constitutionally deprive William Ross of his life. While that motion was initially granted by the district court, it was reversed in 1990 by the Seventh Circuit Court of Appeals in the first appeal on this issue. Then, the Court of Appeals, assuming the allegations of the Complaint to be true, held that the law in 1985 clearly established that Gordon Johnson, by unreasonably depriving William Ross of the services of voluntary rescuers, without providing a meaningful alternative rescue service, violated Ross' rights under 42 U.S.C. §1983. The case was thus remanded for discovery and trial.

Tellingly, the Complaint's recitation of the facts leading up to William's death were amply proven by discovery, and, with few exceptions, have never been the subject of any serious dispute.[2] It is undisputed, for example, that lifeguards (in uniform), fire department personnel, and policemen responded to the friends' call for help and were on the end of the breakwater with rescue equipment within minutes of William's fall into the lake.

It is similarly undisputed that the lifeguards and the fire fighters were ready and willing to attempt a rescue -- as were the two civilian scuba divers that arrived shortly thereafter, dressed in full wet suits, oxygen tanks, weight belts and other safety equipment. It is undisputed that Gordon Johnson threatened and prevented all of these would-be rescuers from attempting to save William Ross, and continued to do so for a period in excess of 25 minutes. It is similarly not contested that one of two civilian divers specifically timed the interval between the time his volunteered rescue services were rebuffed by Gordon Johnson and the time it took the "official" divers to arrive, and timed it at 18 minutes. It is also undisputed that William Ross was recovered quickly once a rescuer was allowed into the water, that William was located beneath the thermocline, in extremely cold water, and that

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[2] Concededly, there is a vigorous dispute amongst the parties as to whether Johnson was acting pursuant to official policy when he prevented the lifeguards, fire fighters and civilian rescuers from attempting to save William Ross--hence the County and Sheriff's Motion for Summary Judgment. However, the presence or absence of an official policy is irrelevant to Johnson's quest for qualified immunity, and thus is of no importance here.

even after the extended period underwater, he was resuscitated and lived for several hours before dying early the next morning. (The issue of water temperature is of no small importance, as -- contrary to the representations made in Johnson's Petition -- by 1985 it was known that a drowning individual's possible survival time in cold water was substantially longer than in warmer water -- and far longer than the five minutes claimed by Johnson).

After discovery, Johnson[3] made yet another attempt to have this matter dismissed on qualified immunity grounds, filing a Motion for Summary Judgment. Johnson's motion rested on the theory that Johnson, allegedly a trained and experienced public safety diver, made a reasoned and informed decision that weather and wave conditions and the structure of the breakwater were too hazardous to permit "non-official" rescue attempts -- even by trained civilian scuba divers who were equipped identically to the diver who eventually rescued William Ross.

Plaintiffs opposed the motion on several grounds. First of all, Plaintiffs noted that Gordon Johnson's attempt to revisit the legal issues of qualified immunity motion was foreclosed by the prior decision and order of the Seventh Circuit Court of Appeals, and was thus barred by the law of the case doctrine. Second, the Plaintiffs observed that the fundamental premises of the motion -- the purportedly "dangerous nature" of any attempted rescue -- was

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[3] Gordon Johnson died while the first appeal was pending and the Administratrix of his estate substituted. For convenience, both the individual and his estate will be referred to as "Johnson".

ludicrous in light of the testimony of a number of witnesses -- including all of the would-be rescuers on the breakwater that day, -- as well as by the simplicity of the "rescue" which was finally allowed to take place. Johnson's theory was, moreover, all but completely undercut by his own actions at the scene, where he failed to take notice of or inquire into any of the volunteer rescuers' qualifications, failed to make any inquiry as to where the official rescuers were and when they would arrive, and failed even to ask how long the boy had been in the water when Johnson arrived on the scene to "take charge". His after-the-fact justification for preventing the rescue attempts was even more strikingly impeached by his statements in official reports, in which he stated that he refused to let the divers into the water because of a Department "policy" of not using civilian divers under any circumstances.

Given both the highly contested nature of the facts upon which Johnson relied to support his immunity defense and the significant body of uncontested evidence showing the arbitrary and reckless nature of Johnson's conduct, Plaintiffs contended that Johnson's summary judgment motion was not only insupportable, but that the evidence would instead support summary judgment in Plaintiffs' favor.

This case was set for jury trial commencing December 7, 1993. On December 3, the District Court denied Johnson's motion for summary judgment, citing to the Seventh Circuit's earlier holding that Johnson was not entitled to qualified immunity as a matter of

law. Johnson filed a notice of appeal to the Seventh Circuit Court of Appeals the next day. Plaintiffs thereafter moved to dismiss that appeal for want of jurisdiction. After permitting Johnson to file his brief on the merits, the Court of Appeals granted that motion, and dismissed the appeal on February 28, 1993, citing authority within the Circuit precluding more that one interlocutory appeal on the issue of qualified immunity. Johnson's petition for rehearing on that ruling was also denied, with opinion, on April 5, 1993.

REASONS FOR DENYING THE WRIT

I. THIS PETITION RAISES NO ISSUE OF CONSTITUTIONAL SIGNIFICANCE WARRANTING THE GRANT OF CERTIORARI.

Petitioner labors long and hard in attempting to manufacture a conflict among the Circuits -- a task foreclosed by the fact that none exists.

Every Circuit that has directly addressed the issue presented here -- whether Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985), authorizes successive appeals limited to the issue of the existence of qualified immunity -- has answered that question in the negative. In fact, no Court of Appeals has, directly or indirectly, endorsed the argument espoused by Johnson here: that he is entitled to a second interlocutory appeal on the legal existence of qualified immunity, despite the existence of a very detailed prior Court of Appeals holding that Johnson's conduct clearly violated established law at the time the boy drowned, solely because he now raises it via a motion for summary judgment, rather

than the motion to dismiss utilized the first time around. The decisions of the Circuits are not "incoherent", as Petitioner claims, they merely fail to support Johnson's position.

At the risk of belaboring the obvious to this Court, the Ross family feels constrained to observe that the exception to the final order doctrine fashioned for qualified immunity determinations in Mitchell v. Forsyth was very narrow:

> *[W]e hold that a District Court's denial of qualified immunity, to the extent it turns on issues of law, is an appealable "final order" within the meaning of 28 USC § 1291 notwithstanding the absence of a final judgment.*

(Emphasis supplied) Mitchell, 472 U.S. at 530.

As this holding, and the Court's underlying analysis make clear, public officials are not even entitled to interlocutory appeal of a denial of qualified immunity if that denial turns on issues of fact, not of law. *See generally* Section II, *infra*. To a like extent, this conclusion certainly does not support, either on its face or by implication, any contention that public officials are entitled to interlocutory appeal of any and all issues relating to claims of qualified immunity, or to unlimited appeals of rulings on repeated motions raising the qualified immunity defense.

That the right to an immediate appeal under Mitchell is a limited one, and does not contemplate successive appeals revisiting the legal issue of whether the law was clearly established, is generally accepted by all Courts of Appeal considering the issue. In addition to the Seventh Circuit, the First, and most recently, the Ninth Circuit have also specifically concluded that Mitchell

authorizes one, and only one, appeal on the issue of qualified immunity. Feliciano-Angulo v. Rivera-Cruz , 858 F.2d 40 (1st Cir. 1988); Abel v. Miller, 904 F.2d 394 (7th Cir. 1990); Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992). Pelletier is particularly instructive in outlining the need to carefully circumscribe the opportunity to delay trial through *seriatim* Mitchell appeals, 968 F.2d at 870 (citations omitted):

> ***We do not, however, hold that an official defendant claiming qualified immunity may take advantage of the several opportunities for immediate appeal afforded him by bringing repeated pretrial appeals. Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one. As we have previously observed, "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision." If appeals from denials of qualified immunity are also to become routine at the motion to dismiss stage, the burden on civil rights plaintiffs, in terms of both delay and expense could be considerable.***
>
> ***More important, the practice of filing routine appeals from denials of pretrial motions for qualified immunity, even in cases in which the district court was clearly correct, evinces a flagrant disregard of the Court's intent in creating the qualified immunity doctrine. The doctrine was created in order to protect good faith exercises of official discretion, not to shield willful or knowing lawless action taken under color of official authority. It was intended to permit "[i]nsubstantial lawsuits [to] be quickly terminated," not to deter legitimate lawsuits from proceeding. The Court has repeatedly and emphatically refused to accord absolute immunity to government officials accused of constitutional transgressions.***
>
> ***[2] For the same reasons that an official defendant may not use the immediate appeal that the law allows him to convince the court to resolve disputed factual issues in his favor, he also may not demand repeated appellate consideration of a claim of***

> *qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain.*

Pelletier's unassailable logic and realistic assessment of the negative impact repeated qualified immunity appeals would have on civil rights litigation is unchallenged by any contrary authority on point. Indeed, purportedly the "conflicting" rulings Johnson proffers do not deal with Johnson's issue at all; rather, they discuss the potential for successive appeals on **clearly distinct claims** of absolute and qualified immunity -- and only on that basis allow that successive appeals could be warranted. See, e.g., Murphy v. Morris, 849 F.2d 1101, 1103-04 (8th Cir. 1988).

In short, there is no significant constitutional issue or conflict among the Circuits on the availability of successive pre-trial appeals on qualified immunity issues. Two Circuits have addressed the issue directly and agree with the Seventh Circuit's holding that successive appeals are not authorized by Mitchell. The remaining Circuits simply have not directly confronted the question.

Try as he might, Johnson simply cannot fashion a constitutional issue from the dismissal of the second appeal. This case remains as it was: a unique case which turns on its own compelling facts -- facts that are of concern only to the parties involved -- and which presents no significant issue for consideration by this Court. Those facts properly lie before a jury in the United States District Court for the Northern District of Illinois.

II. EVEN IF A SECOND INTERLOCUTORY APPEAL WERE THEORETICALLY POSSIBLE UNDER MITCHELL V. FORSYTH, IT WOULD NOT BE AVAILABLE IN THIS CASE.

Johnson's attempts to obtain a second interlocutory appeal on qualified immunity by fashioning an issue worthy of the attentions of this Court is, at bottom, an exercise in futility, as any interlocutory appeal in this case is doomed, regardless of the outcome here. It is clear that neither a summary judgment finding qualified immunity, nor an interlocutory appeal of the denial of summary judgment on that basis, will lie when the issue of immunity turns on factual issues. As the Seventh Circuit Court of Appeals has pointed out:

> *It would extend Mitchell well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights... Mitchell did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly held that Mitchell does not authorize an appeal to argue "we didn't do it". We join them.*

(Citations omitted) Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991), *cert. den.* 112 S.Ct. 1242 (1992). As the Seventh Circuit also observed in Elliott, this is not an issue that has caused any conflict among the various Courts of Appeal, or indeed given them any real difficulty; every Circuit considering the issue has uniformly and unequivocally held that an immediate interlocutory appeal is not available when the assertion of qualified immunity turns on issues of contested material fact. Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991); Ryan v. Burlington County, 860 F.2d

1199, 1203 n.8 (3d Cir. 1988), *cert. den. sub. nom.* Fauver v. Ryan, 109 S.Ct. 1745 (1989); Lion Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987); Velasquez v. Senko, 813 F.2d 1509, 1511 (9th Cir. 1987); Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991), *cert. den.* 113 S.Ct. 62 (1992).

In the first appeal in this case, the Seventh Circuit held that as matter of law Gordon Johnson knew or should have known that he could not use his police power to unreasonably deprive william Ross of his life, by prohibiting rescue attempts by qualified, albeit "nonofficial", personnel. The case was thus remanded for discovery and trial. The motion for summary judgment Johnson later filed proffers evidence on such matters as wave heights and water temperatures on August 11, 1985, the construction of the breakwater, the relative qualifications of Johnson, the civilian scuba divers, and other would-be rescuers, and the testimony of a "expert" as to what a hypothetical public safety diver would do in that situation -- all to show that Gordon Johnson acted reasonably in prohibiting all attempts to rescue William for a period of between 18 and 30 minutes, and, thus, in effectively condemning him to death by drowning.

Johnson's factual "showing" on these issues was countered by voluminous deposition testimony and other evidence proffered by the Plaintiffs, which showed that William Ross could have been safely rescued from the lake within a matter of seconds by any of several willing rescuers -- including lifeguards, firemen/paramedics and fully equipped and trained civilian scuba divers -- and, given the

frigid water in which he was found, likely would have both survived and recovered had such a rescue been allowed.

Clearly, this was a motion -- and an appeal -- that was doomed to fail. To the extent summary judgment would be based on the issue of law, the earlier decision of the Seventh Circuit that the law governing Johnson's conduct on August 11, 1985 was clearly established is the "law of the case" in this suit. To the extent summary judgment would depend on the absence of any material issues of fact, Johnson's motion was still an exercise in futility given the facts disclosed in discovery and disputed by Plaintiffs and Johnson in the motion.

Nor was there any jurisdiction for Johnson's interlocutory appeal to the Seventh Circuit under either scenario, as an appeal of issue governed by the law of the case is subject to dismissal for being frivolous, *see, e.g.* Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989), while an interlocutory appeal on factual issues is precluded by unanimous Circuit authority interpreting Mitchell v. Forsyth.

To put it bluntly, the number of contested issues of material fact which stand between Johnson and summary judgment on the issue of qualified immunity would preclude a Mitchell appeal in this matter regardless of whether it was Johnson's first, second, or fourth appeal. That fact alone constitutes a second, wholly independent basis for the dismissal of this interlocutory appeal, and dooms it regardless of any ruling obtained on any "successive appeals" issue. As this fact renders any opinion this court might

issue in this case largely advisory in nature, it is yet another reason why *certiorari* should be denied.

CONCLUSION

Although the eighth anniversary of William Ross' death will be observed shortly, his family still awaits a trial on its claims, while successive appeals filed by Johnson and other defendants glaciate their way through the Federal Court system. It was just this kind of "litigation by attrition" that caused the First, Seventh and Ninth Circuit Courts of Appeal to unequivocally limit the number of Mitchell appeals available to a given Defendant; it similarly now mandates that *certiorari* in this be case be denied, and this matter speedily returned to the district court for trial.

Johnson' posturing notwithstanding, this matter presents no threat to the integrity or viability of Mitchell v. Forsyth; Johnson here received all that he was entitled to receive under that doctrine -- a determination early in the litigation that the law governing his conduct the day William Ross died was indeed "clearly established", and that no immunity would lie. The evidence since adduced in discovery, much of which shows an even more egregious course of conduct by Petitioner, also dispositively proves the allegation of the Complaint -- thus rendering the genesis of this latest, fruitless appeal curious indeed.

This case, while of grave importance to the Ross family, is singularly (and tragically) unique in its facts, and presents no issue of general significance to public officials or §1983

litigants generally. Johnson should not be permitted to use this Court to further postpone a full trial in this matter under the guise of resolving some illusory "conflict" in the Circuits.

WHEREFORE, OLLIE BELLE and JESSE ROSS, Respondents herein, respectfully urge that the Petition for *certiorari* be denied.

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